

# Texas Law Review

## *See Also*

Response

Taking It to the Streets

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For more than fifty years, some of the best minds in criminal law theory have applied some of the most sophisticated tools of analysis in an effort to solve the seemingly insolvable blackmail paradox.<sup>1</sup> Whether any of these theorists has been successful is debatable. In *Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory*, Paul Robinson, Michael Cahill, and Daniel Bartels advance the novel—dare I say, paradoxical—notion that one way to solve the problem is to ask a collection of laypersons, untutored in law or philosophy, what *they* think should count as blackmail.<sup>2</sup>

There is much about the article that is admirable: The way the authors derive concrete scenarios from abstract theories is ingenious; their summary of the various blackmail theories is a model of conciseness; the methodological techniques they use are exemplary. As is the norm for brief responses of this sort, however, I shall focus on what I perceive as the article's shortcomings rather than its strengths. In so doing, I do not mean to minimize the authors' achievement.

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1. The seminal piece is Glanville Williams, *Blackmail*, CRIM. L. REV. 79 (1954). *See also, e.g.*, JOEL FEINBERG, HARMLESS WRONGDOING (1988); Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998); George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617 (1993); Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567 (1993); Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156 (1980).

2. Paul H. Robinson, Michael T. Cahill, & Daniel M. Bartels, *Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory*, 89 TEXAS L. REV. 291 (2010).

## I. The Puzzle of Blackmail

The blackmail paradox is often described, as the authors themselves describe it, as follows:

[Blackmail] criminalizes the threat to do something that would not be criminal if one did it. If your acquaintance is having an affair, it is no crime to tell his wife of his infidelity. However, if you *threaten* to do so unless he pays you \$100, that threat is criminal—even if he would consider it a bargain and quickly accept your offer.<sup>3</sup>

Thus, what makes blackmail supposedly paradoxical is the idea that it should be a crime to make certain kinds of threats, even though the threatened acts themselves are perfectly legal.

Whether a scheme of this sort really is “paradoxical” is unclear, but it is worth noting that it is not unique in our criminal law. As normally defined, blackmail is a form of theft or attempted theft.<sup>4</sup> The offender seeks to obtain property from the victim without his valid consent, and uses a coercive, though otherwise lawful, act to do so.<sup>5</sup> Something closely analogous occurs in the case of false pretenses and fraud, where the offender attempts to obtain property from the defendant by means of a lie or other form of deception—an act that, by itself, is not normally unlawful.<sup>6</sup> If he is successful in obtaining the property, we call it false pretenses; otherwise, it is attempted false pretenses.<sup>7</sup> And where the crime is fraud, it does not normally matter whether the attempt is successful or unsuccessful; the use of deception itself, as a means to obtain property, is enough to constitute the crime.<sup>8</sup>

Yet, while the otherwise lawful character of the offender’s act does not make blackmail unique, there is something puzzling about blackmail that does not occur in the case of fraud or false pretenses. With the latter crimes, we do not distinguish based on the subject matter of the deception. As long as it concerns the quality, adequacy, or price of goods or services, or the nature of the bargain struck, the offender’s deception is considered adequate to satisfy the requirements of false pretenses.<sup>9</sup> With blackmail, by contrast, we do distinguish based on the subject matter of the otherwise lawful threat. Demands for money based on threats to expose embarrassing information are

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3. *Id.* at 293.

4. FEINBERG, *supra* note 1, at 241.

5. For the moment, I put to the side, as not being truly blackmail, those cases in which the offender seeks something other than property—say, he threatens to expose the senator’s extramarital affair unless the senator votes the way the offender wants him to.

6. STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 148–60 (2006).

7. *Stepney v. United States*, 443 A.2d 555, 557 (D.C. 1982) (“[T]he elements of the crime of attempted false pretenses . . . are an intent to commit it, the doing of some act towards its commission and the failure to consummate its commission.” (internal quotations omitted)).

8. 18 U.S.C. § 1341 (2006) (applying to anyone who “devise[s] or intend[s] to devise any scheme or artifice to defraud”) (emphasis added).

9. *See, e.g., United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970).

almost invariably treated as criminal, while demands for money based on threats to file a lawsuit, go out on strike, conduct a boycott, or fire an employee are less commonly treated as such.<sup>10</sup> Thus, the real puzzle of blackmail, in my view, is not “why do we criminalize demands for money based on threats to do acts that are otherwise lawful?” but “why do we criminalize demands for money based on threats to do some kinds of acts that are otherwise lawful, but not others?” The real question that blackmail raises, then, is whether there is any principled way to distinguish between these two different kinds of threats; and it is essentially that question that Robinson, Cahill, and Bartels decide to take to the ordinary man in the street.

## II. Why Ask the Man in the Street What He Thinks About the Criminal Law?

Why should criminal law theorists care what laypersons think about various issues in criminal law? As Robinson (along with John Darley) explained in an earlier work:

The criminal justice system’s power to stigmatize depends on the legal codes having moral credibility in the community. The law needs to have earned a reputation for accurately representing what violations do and do not deserve moral condemnation from the community’s point of view. This reputation will be undercut if liability and punishment rules deviate from a community’s shared intuitions of justice.<sup>11</sup>

Thus, in Robinson and Darley’s (and, I assume, Cahill’s and Bartels’s) view, the reason we need to ask people about their views concerning criminal liability and punishment is to determine if our law is in harmony with the community’s sense of justice in the way that a healthy system of criminal justice should reflect.

I can think of at least three contexts in which it is useful to have data concerning community views on particular criminal law offenses (no doubt there are others). First, it is useful to know if people believe that a particular paradigmatic act is sufficiently blameworthy to justify criminal sanctions in the first place. For example, we might want to know what percentage of people thinks it should be a crime to use certain kinds of illegal drugs, engage in insider trading of stocks, or illegally download music and movies from the Internet. If we found that some high percentage of people believe that conduct of these sorts was not worthy of criminalization, that would not necessarily be a sufficient reason to decriminalize, but it should at least give us reason to pause before pressing on with criminalization.

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10. GREEN, *supra* note 6, at 224–33; *see also* Stuart P. Green, *Theft by Coercion: Extortion, Blackmail, and Hard Bargaining*, 44 WASHBURN L.J. 553, 556–57 (2005) (explaining that the narrow “American” definition of blackmail generally includes only informational blackmail).

11. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 21 (2007).

Second, there are cases in which there is widespread agreement about the appropriateness of criminalizing the paradigmatic case of a given crime, but a lack of consensus about what we might call outlying cases. For example, as my collaborator, social psychologist Matthew Kugler, and I found in a currently in-progress empirical study of community attitudes regarding white-collar offenses, almost everyone agrees that it should be a crime for a congressman to agree to vote for a particular piece of legislation in return for accepting a bag of cash (the paradigmatic case of bribery), but many fewer people think that it should be a crime for a congressman to agree to vote for such legislation in return for accepting, say, a political endorsement in the next election (which we took to be an outlying case).<sup>12</sup>

Finally, there are cases in which we want to know how severely people think some putatively criminal conduct should be punished in comparison to other crimes. Sometimes we are interested in knowing how the core case should be punished in comparison with outlying cases. Other times, we want to know how severely core or outlying cases should be punished in comparison with unrelated forms of criminality. Thus, in an earlier empirical study, Kugler and I found that a scenario involving a core case of informational blackmail was viewed by the public as *more* blameworthy and deserving of more punishment, than larceny, embezzlement, passing a bad check, false pretenses, failing to return lost or misdelivered property, and receiving stolen property; and *less* blameworthy and deserving of less punishment than simple robbery, armed robbery, burglary, and extortion.<sup>13</sup>

The study by Robinson, Cahill, and Bartels offers valuable data concerning all three of these issues. First, it unsurprisingly confirms previous findings that most people view the core case of informational blackmail as blameworthy and worthy of criminalization. Second, it offers a rich trove of data on how the public views the criminalization of a wide range of “outlying” conduct that does not constitute informational blackmail *per se* but bears some family resemblance to it. In some cases, the authors have changed the form of the demand. Instead of asking for money, the offender demands that the victim: give up drinking, withdraw his application to the police academy, cut down an offending tree, admit his guilt for a crime he committed, or pay money to a bank. In at least two other cases, they have altered the form of the threat. Instead of threatening to expose embarrassing information about the victim, the offender threatens to file a lawsuit against him or have a bank foreclose on his loan. Finally, the authors have compiled valuable information not just about whether the public thinks these acts

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12. Stuart P. Green & Matthew Kugler, Law & Contemp. Probs. (unpublished manuscript) (on file with author).

13. Stuart P. Green & Matthew B. Kugler, *Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation*, 7 J. EMPIRICAL LEGAL STUD. 511, 527 tbl. 1 (2010).

should or should not be criminalized, but also about how they think these acts should be punished relative to each other.

At the risk of criticizing the authors for not writing the article that I would have written if I had had the clever idea to do a study of this sort, I probably would have asked subjects what they thought about a different set of blackmail-related scenarios. First, my inclination would have been to rely more on scenarios drawn from puzzling real-world cases in which prosecutors or courts have suggested that blackmail has been committed where an offender demanded money or property based not on a threat to disclose embarrassing information, but rather on a threat to: (1) inflict political damage or withhold political support;<sup>14</sup> (2) withhold found property from its rightful owner;<sup>15</sup> (3) engage in a union work stoppage;<sup>16</sup> (4) take over a company unless its stock is bought at a premium price;<sup>17</sup> (5) fire, or fail to hire, an employee;<sup>18</sup> or (6) file a frivolous lawsuit.<sup>19</sup>

Second, I probably would have stuck with cases in which what was demanded of the victim was that he hand over money or property, rather than that he do something else (such as give up drinking, withdraw an application to the police academy, or cut down an offending tree), since demands for things other than money or property do not constitute theft (or attempted

14. See, e.g., Andy Newman, *Case Turns on Whether Usual Politics is a Felony*, N.Y. TIMES, Nov. 19, 2003, at B1 (reporting controversy regarding a case in which two Democratic party leaders were alleged to have threatened to take party support away from civil court judge candidates unless the candidates came up with sufficient money).

15. See, e.g., *United States v. Taglione*, 546 F.2d 194, 196 (5th Cir. 1977) (reversing the conviction of a defendant who refused to return \$100,000 in found receipts unless the rightful owner paid him a \$25,000 “finder’s fee”).

16. See, e.g., *United States v. Clemente*, 640 F.2d 1069, 1072 (2d Cir. 1981) (upholding the conviction of defendants who exerted control over a longshoreman’s union, allegedly keeping laborers from unloading cargo ships unless the shipping companies paid the amounts demanded).

17. See, e.g., *Viacom Int’l Inc. v. Icahn*, 747 F. Supp. 205, 211 (S.D.N.Y. 1990) (examining a Hobbes Act extortion case in which the defendant firm allegedly threatened a takeover of the plaintiff firm if plaintiff did not buy defendant’s shares at a specified price).

18. See, e.g., *United States v. Capo*, 817 F.2d 947, 950 (2d Cir. 1987) (holding that a job-selling scheme did not constitute extortion under the Hobbs Act where the plaintiffs could not prove that the victims “reasonably feared that the defendant could and would impede his chances of getting a Kodak job”).

19. See, e.g., *State v. Rendelman*, 947 A.2d 546 (Md. 2008) (affirming that the threat to pursue legal action if a settlement payment is not made is not extortion by “wrongful threat” under Maryland statute, even if made in bad faith).

Whether each of the scenarios described in notes 14–19 should be treated as a crime is discussed in GREEN, *supra* note 6, at 224–34.

At the very least, I would have wanted to ask the public what it thought about some of the provisions contained in the Model Penal Code’s unusually broadly defined blackmail provision, which makes it a crime to “obtain[] property of another by threatening” not only to “expose any secret tending to subject any person to hatred, contempt or ridicule,” but also, *inter alia*, to (1) “take or withhold action as an official, or cause an official to take or withhold action”; (2) “bring about or continue a strike, boycott or other collective unofficial action”; (3) “testify or provide information or withhold testimony or information with respect to another’s legal claim or defense”; or (4) “inflict any other harm which would not benefit the actor.” MODEL PENAL CODE AND COMMENTARIES § 223.4 (1980).

theft) and, therefore, from my perspective, are fairly far afield from the paradigmatic case of blackmail. Despite these quibbles, however, I genuinely believe that the data gathered should be of real use to any future criminal codifiers who are interested in how the public views the blameworthiness and punishability of a number of interesting blackmail-related acts.

### III. Empirical Evidence as a Means of Explaining the Paradox

Of course, the authors are not interested merely in obtaining data on the public's views of a random collection of blackmail-related conduct. The scenarios they use were formulated, obviously with great care, to reflect a range of prominent theorists' views about why we are justified in treating blackmail as a crime. And, indeed, the effort to translate abstract theory into concrete scenarios seems to me the most impressive achievement of the article. My sense that they mostly got things right in this regard is strengthened by various footnotes suggesting that several of the original theorists themselves essentially "signed off" on the accuracy of the scenarios.<sup>20</sup>

Nevertheless, I am skeptical about two important aspects of this endeavor. First, I am doubtful that the blackmail theorists cited really were, as the authors claim, attempting to devise a theory that would "accord with" or "predict" or "reflect" "widely shared moral intuitions" on these issues.<sup>21</sup> So far as I can tell, the main purpose of such theorizing was to formulate a critical theory that explains why the core case of informational blackmail should be treated as a crime. While some theorists might well be pleased to learn that the public's views of what should count as blackmail are consistent with their own, I see very little textual evidence to suggest that this was prominent in their minds. Indeed, the literature on blackmail is in some respects the epitome of ivory-tower criminal-law theorizing: dense, highly abstract analysis concerning a rarely committed or prosecuted crime, written by a small circle of philosophically inclined writers, largely referencing each other. I doubt many of these theorists, presented with evidence that the public holds a view different from their own, would be inclined to give up on their carefully crafted theories. Few theorists that I know of are so populist in their approach.

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20. See, e.g., Robinson, Cahill & Bartels, *supra* note 2, at 324 nn.104–05 (citing e-mails from Mitchell Berman and Leo Katz commenting on aspects of Scenario 10); *id.* at 329 n.124 (noting that James Lindgren has discussed the precise situation posed in Scenario 5 in one of his works).

21. See *id.* at 349 ("The intellectual paradox of blackmail has given rise to a host of explanatory theories, most rooted in an effort to reflect and justify shared moral intuitions . . ."); *id.* at 294 ("It is typical for such theories to defend their moral judgments or assertions by relying on the claim that a stated moral position accords with widely shared moral intuitions."); *id.* at 322 ("Each theory predicts a different pattern of criminalization results for the eleven scenarios . . ."); *id.* at 349 (noting that the study results reveal that none of the theories studied "accord with popular intuitions as well as the Model Penal Code").

Second, despite the authors' apparent success in translating theory into testable scenarios, I am not sure that this is ultimately a satisfactory way of testing which theory the public would favor. Most, though not all, of the blackmail theories discussed are focused on explaining why the core case of informational blackmail should be treated as a crime, rather than with the criminalization of what I have called the outlying cases (though Leo Katz is an obvious exception here).<sup>22</sup> Surely, it is possible that a theorist could be correct in explaining why the core case of informational blackmail should be a crime even if he is wrong about the outlying cases. If we really wanted to know which theory the public thinks offers the most plausible explanation for why the core case of blackmail is a crime, why not simply ask them? Hold a public seminar, explain the six or seven leading theories, and then ask attendees to vote for which theory they think is most plausible. And if some of the subjects respond by stating that the theories are too complex to understand, well, would that not be sufficient evidence to conclude that the theories fail to "accord with" or "predict" their views?

#### IV. Taxonomy of State Blackmail Statutes

There is one final issue I want to mention, concerning the authors' taxonomy of state blackmail statutes. Once again, they provide a useful service. This may be the first time that anyone has taken the trouble to go through the criminal codes of all fifty states, the U.S. Code, and the District of Columbia Code to see how blackmail is actually codified in practice. The problem, in my view, is that the statutes are categorized along only two dimensions: (1) the breadth of the range of demands criminalized, and (2) the breadth of exceptions or special defenses to the crime.<sup>23</sup> It seems to me that at least as important a factor in distinguishing among blackmail statutes is the breadth of the range of *threats* criminalized. That is, we should be interested not just in what blackmail statutes require the offender to demand (*e.g.*, money, sex, or political influence), but also what they require him to threaten (*e.g.*, exposing embarrassing secrets, going out on strike, filing a lawsuit, firing an employee, or withdrawing political support). Indeed, I would argue that, in distinguishing among blackmail statutes, the nature of the threat required is even more important than the nature of the demand made, since statutes that make it a crime to demand something other than money or property are, in my view, not properly viewed as blackmail to begin with. The authors are obviously aware of the variation in kinds of threats required, since they are reflected in the scenarios themselves. It is a puzzle, then, why they do not include that factor in their scheme of categorization.

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22. See Katz, *supra* note 1, at 1569–74 (explaining a number of “collateral problems” relating to the criminalization of blackmail).

23. See Robinson, Cahill & Bartels, *supra* note 2, at 313–47 (categorizing statutes based on whether they have “narrow” or “broad” definitions and as whether they have “narrow,” “broad,” or “no” exceptions).